

1997

# Smith Investment Company, Sandy Hills, Inc. v. Sandy City : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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SMITH INVESTMENT COMPANY, a Utah	:	
corporation, and SANDY HILLS,	:	
INC., a Utah corporation,	:	
	:	<b>BRIEF OF APPELLEE</b>
Plaintiffs/Appellants,	:	<b>SANDY CITY</b>
	:	
vs.	:	
	:	Case No. 970008-CA
SANDY CITY, et al.,	:	
	:	
Defendants/Appellees.	:	

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APPEAL FROM A DECISION OF THE  
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY  
HONORABLE TIMOTHY R. HANSON, DISTRICT JUDGE

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Oral Argument Priority Classification No. 15

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### **STATEMENT OF JURISDICTION**

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

Sandy City generally accepts the appellants' second and third statement of the issues before this court. However, the first issue should be restated to more accurately reflect the nature of the inquiry and actual ruling by the trial court which concluded the record supports a reasonable basis for the zoning change. Sandy City would restate the issue as follows:

1. Whether the trial court was correct in determining that the legislative record supports a reasonable basis for the zoning change consistent with the City's exercise of its police power in furtherance of the protection of the public health, safety and welfare.

Sandy agrees that the appropriate appellate standard of review on all these issues is for correctness.

### **DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

1. Utah Constitution, Article I, Section 22. Set forth at appellants' Addendum B.
2. U.S. Constitution, Amendment V. Set forth at appellants' Addendum B.
3. U.S. Constitution, Amendment XIV. Set forth at appellants' Addendum B.
4. Utah Code Ann. § 27-12-89 (1963). Set forth at appellants' Addendum B.



### STATEMENT OF THE CASE

This case as presently constituted is the result of a consolidation of three separate actions. Several claims had been resolved by the time the trial court heard cross-motions by the parties for summary judgment on the three remaining issues. The primary focus was on the claim by Smith Investment Company and Sandy Hills, Inc. (jointly "Smith") that Sandy City had improperly rezoned a portion of property owned by it from commercial to residential uses, amounting to a substantive due process violation and an uncompensated taking. Smith's second claim was that the City improperly barricaded the end of 1055 East Street, cutting off access to the rear of its property. The last issue was an allegation of trespass arising from water flows from adjoining subdivisions which allegedly drained into irrigation ditches on Smith's property. Smith has chosen not to pursue the trespass issue on appeal. Appellant's Brief, p. 3, n.1.

Pursuant to the cross-motions, the trial court determined that the City's rezoning of the property was reasonable and did not give rise to a constitutional violation or an uncompensated taking. It also ruled that the barricading of 1055 East was a reasonable exercise of the City's police power and did not deprive Smith of all reasonable access to the property. Smith argues on appeal that these rulings are erroneous.

## **STATEMENT OF FACTS**

### **Substantive Due Process and Takings Issues**

1. In 1980 Sandy City adopted a new Development Code which included comprehensive general plan amendments for the entire City. R. 459.

2. Following adoption of the new Development Code, the City began a systematic process of evaluating and enacting zoning changes throughout the City to reflect the newly adopted development code. This was done by "quadrant" or designated community area. Smith's property is located within the "Sandy Community." R. 220-255, 459, 484-509.

3. Smith's property was not targeted for an isolated zoning change, but was merely one of a large number of proposed changes for the City. R. 220-255, 459, 484-509.

4. Prior to a final decision to rezone the rear portion of the Smith property from C-2 to R-2-10, the City engaged in a long and comprehensive evaluation which included input from a variety of sources such as the Sandy Community Citizens' Report, R. 263-89, 459, a Planning Department Report, R. 220-255, 459, public input at various meetings and public hearings before the Planning Commission and City Council from September 1980 through April 14, 1981. R. 297-301, 329-85, 459-60.

5. The Sandy Community Citizens' Report, R. 263-289, includes as one of the primary Sandy Planning Community goals and policies to preserve residential uses within the original part of Sandy in order to develop a strong community identity and preserve the integrity of this area of the City. R. 277.

6. The Sandy City Comprehensive Plan Goals and Policies, R. 302-28, identifies goals and policies addressing issues of growth, land use, community identity, transportation and others. Among those goals and policies is that proposed uses of lot depths exceeding 200 feet should be subject to conditional site plan review. R. 319. There is no requirement that development to a depth of 200 feet be defined or treated as "strip commercial."

7. On September 30, 1980, a staff member of the Planning Department made a presentation to the City Council on the proposed zoning changes. That report included the following recommendation related to the Smith property:

With the existing commercial it appears there may be excessive commercially zoned land and developed commercial square footage in this area for this type of commercial use development. Additional concerns were over the number of stub streets that go into the back of the property, existing street pattern and traffic generation and the access to future commercial development.

In response to these and other concerns, the Planning Staff recommended rezoning the rear portion of Smith's property from C-2 to R-2-10. R. 484-509.

8. The rear portion of the Smith parcel was rezoned to R-2-10 on April 14, 1981. R. 461.

9. At the City Council meeting when the rezoning decision was made, "Mr. Smith was told that he could come back again with a request for rezoning but should bring a site plan for the Council to review." R. 461.

10. Subsequent to the rezoning, Smith never made a rezoning application, a request for general plan amendment or an application for development approval.

11. The R-2-10 zone permits single family residential use, two-family housing, certain agricultural uses and home occupations. Conditional uses within that zone include, but are not limited to, group day care, dwelling for the elderly and handicapped, planned unit developments, outdoor recreation, etc. R. 510.

12. The trial court entered its memorandum decision on May 21, 1996. R. 775-81.

#### Barricading Issue

13. Smith's property has approximately 286 feet of frontage directly accessing onto 700 East Street. R. 694.

14. Abutting Smith's north property line at its west end is the Southland Acres No. 3 subdivision. R. 694, 706.

15. Southland Acres No. 3 contains a dedicated roadway designated as 1055 East and 1075 East Street. The street curves to the southeast, resulting in the change of numerical designation at the south end of the street. R. 694, 706. This single, continuous street will be referred to herein as 1055 East.

16. Smith's north property line is the terminus of 1055 East. R. 694, 706.<sup>1/</sup>

17. Abutting Smith's south property line are the Brighton View Subdivision and the Del Ruby Subdivision. R. 694-95, 706.

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<sup>1/</sup> Smith carefully implies that the barricades placed by the city block this public roadway. The dedicated street, however, terminates at the boundary between Smith's property and the subdivision. The barricades were erected at the end of the dedicated public roadway.

18. Through the Brighton View Subdivision runs Brighton Drive. Smith's south property line is the terminus of Brighton Drive. R. 695, 706.

19. Through the Del Ruby Subdivision runs Jean Drive. Smith's south property line is the terminus of Jean Drive. R. 694.

20. On the west side of Smith's property lies the Mt. Jordan Addition Subdivision. R. 695, 706.

21. Through the Mt. Jordan Addition Subdivision runs Greenwood Drive with a stub road turning off Greenwood Drive. Smith's west property line is the terminus of Greenwood Drive. R. 695, 706.

22. On May 23, 1978, at a regularly scheduled and noticed public meeting, the Sandy City Council discussed, among other items, the request of property owners living on 1055 East that the City reinstall permanent barricades at the south end of the street which had recently been removed. The Council voted to erect a temporary barricade pending investigation by City departments and an evaluation and recommendation by the police department. R. 707-08.

23. On May 30, 1978, at a regularly scheduled and noticed public meeting, the Sandy City Council reviewed reports from City departments and a recommendation from the police department that 1055 East be permanently barricaded. The Council voted unanimously to have permanent barricades reinstalled. R. 768-69.

### SUMMARY OF ARGUMENT

In the early 1980s Sandy City undertook a comprehensive city-wide evaluation of its zoning ordinances which resulted in an update of its general plan and development code and rezoning of parcels within the City to be consistent with the updated code. These legislative decisions are entitled to the same deference and presumption of validity afforded to the original exercise of the City's legislative discretion in furtherance of its police powers through the enactment of the original zoning ordinances. Smith has failed to overcome that strong presumption of validity or demonstrate any basis to establish that the rezoning constituted a substantive due process violation. The trial court correctly determined that the City's exercise of its police power in rezoning Smith's property was proper and did not deprive Smith of any constitutionally protected right or interest.

Smith has also failed to meet the substantial threshold requirement necessary in order to show deprivation of all economically viable or reasonable use of its property in order to assert a takings claim under federal or state law. Its arguments based upon deprivation of a unilateral development expectation or diminution in value of its property fail to meet the legal requirements to establish a taking. The trial court properly ruled that there was no regulatory taking.

The City's barricading of the end of a dedicated public street at the boundary of a subdivision did not give rise to a compensable injury. The barricades were installed pursuant to a proper exercise of the City's police power. Any limitation of

access by these barricades caused no damage to the property because there was sufficient and reasonable alternative access.

The trial court appropriately granted the City summary judgment on all the issues before it. Its well-reasoned decision should be affirmed.

### ARGUMENT

#### **I. SANDY CITY'S COMPREHENSIVE CITY-WIDE GENERAL PLAN AMENDMENT AND RELATED REZONING, INCLUDING SMITH'S PROPERTY, DID NOT CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION.**

In analyzing Smith's substantive due process claims challenging the validity of the zoning ordinance affecting their property, several undisputed underlying facts set forth in the legislative record should be considered. First, the rezoning of the Smith property was not, as they imply, a "targeted" zoning change. Rather, it was part of a city-wide effort to re-evaluate and modify the long-term plans for development of the City and to make appropriate zoning changes consistent with the revised general plan. Second, Smith argues that using the rear portion of their property for residential development would be "detrimental to the existing community." This, however, is a judgment decision reserved to the City Council as representatives of the community. The courts typically grant considerable deference to municipal bodies making this type of legislative determination. Third, Smith made no application for development approval prior to the zoning change which would establish any type of vested right to maintain the historical zoning of the property. Fourth, much of Smith's argument is based upon their unilateral expectations that the commercial zoning of their property zoning would be fixed in time and not subject to any

change based on the evolving needs and welfare of the community. There is clearly no legal support for this argument that the City is forever bound by a decision made by its legislative body thirty years earlier.

**A. SANDY CITY'S LEGISLATIVE LAND USE DECISIONS ARE ENTITLED TO A PRESUMPTION OF VALIDITY AND BROAD JUDICIAL DEFERENCE. SMITH HAS FAILED TO OVERCOME THAT PRESUMPTION OR TO DEMONSTRATE WHY DEFERENCE SHOULD NOT BE AFFORDED.**

Substantive due process claims are reviewed by courts with considerable deference to legislative decisions with the exercise of zoning and police powers deemed presumptively valid. E. H. Ziegler, 1 Rathkopf's the Law of Zoning and Planning, 4ed (1989) § 3.04[1] at 3-22. The burden of overcoming this presumption and deference lies with the plaintiff who is making the due process challenge. Id. Utah law is in accord with this general proposition. See *E.G., Call v. City of West Jordan*, 614 P.2d 1257, 1258 (Utah 1980) (ordinance passed within the scope of legislatively granted power is accorded a presumption of constitutional validity). The Utah Supreme Court has traditionally granted municipalities considerable discretion in their exercise of the legislative power to zone.

In the review of zoning cases the function of the court is narrow and its scope is limited to a determination of whether or not the action of the Board of County Commissioners as a legislative body is illegal, arbitrary, discriminatory or capricious. No contention is made that the county did not act within its grant of powers from the legislature in its adoption of the original zoning ordinance. The prior decisions of this court without exception have laid down the rule that the exercise of the zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie



solely within that discretion. It is the policy of this court as enunciated in its prior decisions that it will avoid substituting its judgment for that of the legislative body of the municipality. Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co., 545 P.2d 1150, 1151-52 (Utah 1976).

The burden a plaintiff must bear in overcoming the presumption of validity is substantial.

While the most common statement of the degree of proof required to overcome the presumption of validity is that the issue must be removed from the area of reasonable debate, the courts have used a variety of language to describe what all agree is an extraordinary burden. A number of courts require that the litigant asserting invalidity prove by "clear and convincing" evidence that the ordinance is unreasonable, arbitrary, or otherwise invalid. Some courts require "clear and affirmative" evidence of invalidity, and others simply require that the invalidity be "clearly" shown or conclusively demonstrated.

K. H. Young, 1 Anderson's American Law of Zoning, 4 ed (1996) § 3.21 at 136-37 (emphasis added).

Where downzoning results as part of a comprehensive zoning amendment, as opposed to piecemeal zoning, the zoning ordinances are afforded the same broad deference given to original zoning enactments.

A truly comprehensive rezoning or comprehensive zoning ordinance amendment--affecting a substantial portion of land within the zoning jurisdiction belonging to many landowners, and usually undertaken in implementation of broad public policy and, typically, after studies and recommendations of planning staff or consultants--is universally considered a legislative act entitled to broad judicial deference. Such a comprehensive rezoning, for purposes of judicial review, occupies the same posture of presumed validity as the original enactment of a zoning ordinance.

Ziegler § 26A.02[3][a] at 26A-11, 12.

Smith has failed to overcome the burden of rebutting the presumption of validity and challenging the deference applicable to such a zoning decision. It argues impliedly, without supporting authority, that the City is not entitled to the same judicial deference historically afforded such legislative decisions. The crux of Smith's argument is that it disagrees with the City's evaluation and determination of what is in the best interest of its citizenry. It also disagrees with the trial court's determination that the zoning decision is supported by the record and would have this Court substitute its judgment for that of the Sandy City Council. Not only does this fail to address the deference and presumption issues, it is contrary to both the undisputed factual record and clear statement of the controlling law.

**B. THE CITY'S REZONING OF SMITH'S PROPERTY CONSISTENT WITH A CITY-WIDE UPDATE OF ITS GENERAL PLAN AND DEVELOPMENT CODE DOES NOT CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION.**

In evaluating a claimed substantive due process violation arising from a zoning ordinance, it is important to bear in mind certain fundamental legal principles. First, an owner of real property "holds it subject to zoning ordinances enacted pursuant to a state's police power." Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 390 (Utah 1980) citing Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). See also Marshall v. Bd. of County Comm's, 912 F.Supp 1456, 1464 (D. Wyo 1996) (a property owner has no vested property right in a contemplated development or entitlement to a particular zoning change). Second, Smith failed to acquire a vested right to

develop under the former C-2 zoning. See Western Land at 396 (development right vests when owner makes application under applicable zoning ordinance and proceeds with reasonable diligence).

Smith argues for a very narrow construction of the City's police powers and exercise of zoning authority granted by the legislature.<sup>2/</sup> This is contrary to Utah law. In 1980, the Utah Supreme Court rejected and abandoned the narrow, strict construction of municipal powers historically known as Dillon's Rule. State v. Hutchinson, 624 P.2d 1116, 1135 n.3 (Utah 1980). In reaching its holding that exercise of the police power to assure the general welfare is entitled to broad deference, the Court quoted from McQuillin, Municipal Corporations:

A general welfare or similar clause, granting extremely broad power to a municipal corporation, is liberally construed to accord to a municipality wide discretion in the exercise of the police power. The cases, indeed, reveal an increasing judicial inclination under such a clause to accord to municipal authorities wider discretion in the reasonable and nondiscriminatory exercise, in good faith, of the police power in the public interest. While under the clause, or under the guise of it, personal and property rights recognized by general law and guaranteed by organic provisions cannot unreasonably be restrained, courts uniformly regard the clause as ample authority for a reasonable exercise, in good faith, of broad and varied municipal activity to protect the health, morals, peace and good order of the community, to promote its welfare in trade, commerce, industry, and manufacture, and to carry out every appropriate object contemplated in the creation of the municipal corporation.

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<sup>2/</sup> It is significant to note that Smith's substantive due process arguments are largely conclusory with citation to only one case which is not dispositive on the due process issue.

Hutchinson at 1125, quoting from 6 McQuillin, Municipal Corporations, §§ 23, 43-44 (3d rev'd ed. 1969). The Hutchinson court concluded that it was inappropriate for the courts to impose narrow, strict construction on the exercise of a municipality's police powers.

[I]t is not appropriate for this Court to enfeeble local governments on the unjustified assumption that strict construction of delegated powers is necessary to prevent abuse. The enactment of a broad general welfare clause conferring police powers directly on the counties was to enable them to act in every reasonable, necessary, and appropriate way to further the public welfare of their citizens.

Hutchinson at 1121.

Even before Hutchinson, the Utah courts have interpreted the municipal police powers broadly in land use decisions. Naylor v. Salt Lake City Corp., 398 P.2d 27, 29 (Utah 1965) (“[W]e are more than cognizant of the proposition that the governing body of a city is endowed with considerable latitude in determining the proper uses of property within its confines.”)

Smith identifies a reasonable relationship standard as appropriate for evaluation of substantive due process claims under federal law. Actually, the standard is much more lenient. In addition, it erroneously argues that the burden is on Sandy City to demonstrate reasonableness and urges the court to apply a narrow interpretation of what constitutes “general welfare.”

The due process inquiry is conducted under a “minimum rationality” test which is much less stringent than the “reasonable relationship” standard urged by Smith.

Under this test, the objective of a given piece of legislation is usually conceded to be valid, and the focus of the inquiry is instead on whether the

means adopted are reasonably calculated to achieve that objective--a criterion which is satisfied by any conceivable, rational basis in fact or logic linking regulation with its intended objective or purpose. If this is within the realm of fair debate, the regulation is deemed valid. As applied by federal courts, and often by state courts, this minimum rationality test for due process validity grants great deference to legislative judgment and involves only minimal scrutiny of whether the ends of regulation are related to its means. There is no inquiry as to whether regulation is unduly restrictive or excessive or whether the regulation is "reasonable" weighing the private burden and public benefits involved. Courts do not inquire as to the wisdom, efficacy, or desirability of regulation.

Ziegler § 3.04[4] at 3-26,27 (extensive footnotes omitted, emphasis added).

It is well-established that the use of zoning ordinances is proper to provide a wide range of intangible social values for residents of a community. Ziegler § 17A.02 at 17A-4,5. The U.S. Supreme Court has recognized the broad scope of objectives which can fall within the police power welfare clause.

The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974), cited with approval in City of Edmonds v. Oxford House, Inc., \_\_\_ U.S. \_\_\_, 115 S.Ct. 1776, 1781, 131 L.Ed.2d 810 (1995). See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (legitimate general welfare purposes include "a more favorable environment in which to rear children," "open spaces and attractive surroundings," and preserving "the residential

character of the neighborhood.”); Naylor at 765 (enhancement of aesthetic values promotes general welfare).

The federal courts apply a two-step test to substantive due process claims in the zoning context. The first step is to “identify[] a legitimate government purpose--a goal--which the enacting government body could have been pursuing.” Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995) (emphasis in original). The second step “asks whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose.” Id. The scope of inquiry is much more lenient than argued by Smith. “The proper inquiry is concerned with the existence of a conceivable rational basis, not whether that basis was actually considered by the legislative body.” Id. (emphasis added).

The standard of review under Utah law is limited to a determination of whether the city’s legislative action is “illegal, arbitrary, discriminatory or capricious.” Crestview-Holladay at 1152. This is done while affording considerable discretion to the legislative act. Id.

This Court has also discussed the broad nature of the exercise of police powers under the general welfare clause in the zoning area. Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602 (Utah App. 1995).<sup>3/</sup> In Patterson, this Court concluded that “the proper exercise of the zoning power does in fact promote the public health, safety and welfare.” Patterson at

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<sup>3/</sup> Although Patterson is a case involving a decision of a county Board of Adjustment, the discussion of the “welfare” clause is even more applicable to the legislative actions of a municipality than to the administrative, quasi-judicial acts of the Board of Adjustment.

607. The Court went on to state that exercise of zoning authority would promote public health, safety and welfare if the exercise of that authority "will make good zoning policy, meaning it will contribute to the orderly development of the county as a whole." Id.

As a general matter, it is the "widely held view of courts that zoning [bodies] may undoubtedly look to the future in implementing a comprehensive land use plan that promotes and enhances the quality of life within the community." Ziegler § 3.03 at 3-21.

Whether the rezoning interferes with Smith's ability to develop the property to their perceived highest or most profitable economic advantage or diminishes its market value is irrelevant to the due process analysis. Ziegler § 3.04[3] at 3-24; Young §3.25 at 150-51 ("A zoning ordinance is not unconstitutional, as applied to particular land, merely because it prohibits a use which is demonstrably the 'highest and best' use of the land in question.")<sup>4/</sup> Nor is it significant that Smith has held the property for a long time while expecting to develop it for commercial use. Historical zoning of a property doesn't fix its use forever. Clary v. Borough of Eatontown, 124 A.2d 54 (N.J. Super. 1956) ("The welfare of the community for all

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<sup>4/</sup> See Village of Euclid 47 S.Ct. 114 (75% diminution in value as a result of zoning), Baranik v. County of Marin, 872 F.2d 834 (9th Cir. 1988) (otherwise valid zoning regulation is not unreasonable simply because it causes diminution in value or prevents most profitable use); William C. Haas & Co v. City & County, 605 F.2d 1117 (9th Cir. 1979), cert denied 445 U.S. 928 (1980) (95% diminution in value). See also Aspen Hill Venture v. Montgomery County Council, 289 A.2d 303 (Md. 1972); Wright v. Littleton, 483 P.2d 953 (Colo. 1971);

time cannot be subordinated to the profit motive of an individual landowner.”)

The trial court correctly concluded that the due process requirements were met by the City.

The record supports a reasonable basis for effecting the zoning change in 1981. The test of a rational relationship to public health, welfare and safety is supported in the record.

R. 777. This ruling clearly meets the minimum rationality test.

The minimum rationality test is satisfied in Sandy City's enactment of its zoning changes. It is easy to conceive that the City Council could have believed that by rezoning properties throughout the City, including Smith's property, it was preserving the residential nature of its community, providing for quiet seclusion and making a sanctuary for its citizens. Such conjecture, however, is unnecessary. The City actually evaluated suggestions from several sources and held multiple public hearings and meetings to evaluate its zoning changes. Those changes were part of a comprehensive plan and provided, in the present case, for expansion of residential properties and limitation of commercial uses which would affect the residential environment.

There is no claim or evidence that the City's rezoning of Smith's property was outside the scope of its statutory zoning authority or that the ordinance was improperly enacted. The legislative act is, therefore, entitled to a presumption of facial validity. The police power having therefore been properly exercised and given that the zoning changes promote orderly development of the City, the conclusion must be that the zoning



ordinance promotes the public health, safety and welfare.

Patterson at 607.

Whether the City could have reached a different conclusion based on the facts or whether the decision reached was the wisest of the available choices is outside the scope of judicial inquiry. It is insufficient for Smith to argue that the facts don't support the City's conclusion or that a better alternative solution was available. Their burden is to demonstrate that there was no rational basis for the conclusion that the City reached or that it was otherwise arbitrary, capricious or illegal. Smith has failed to meet this burden. There is, therefore, no substantive due process violation arising from the City's rezoning of the Smith property.

**II. THE CITY'S REZONING OF THE SMITH PROPERTY DOES NOT AMOUNT TO AN UNCOMPENSATED TAKING UNDER FEDERAL OR STATE LAW.**

Prior to analyzing Smith's takings arguments, some background observations are appropriate. First, Smith has never made application to Sandy City for development approval for the property at issue.<sup>5/</sup> As a result, no final decision applying the ordinance to the Smith property has been obtained, making its federal takings claim unripe for decision under federal law.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192 (1985); Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 722 (10th Cir 1989).<sup>6/</sup> Second, there has

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<sup>5/</sup> In fact, Smith has done nothing for a substantial period of time to make improvements beyond the commercial development completed on the front of the property many years before. It has made no recent investment to support its "investment-backed expectations" argument.

<sup>6/</sup> This ripeness argument was raised before the trial court but did not play an express role in the court's decision.

been no physical taking of Smith's property nor any exercise by the City of its power of eminent domain. Third, there has been no typical "inverse condemnation" where there is governmental intrusion tantamount to or the functional equivalent of a literal physical taking or occupation of Smith's property. This is simply an issue of whether the rezoning amounts to a regulatory taking for which Smith should be compensated.

Smith bases its takings claim upon (1) the zoning of the property at the time they acquired it, (2) their unilateral expectation to commercially develop the property, at some undefined future time, (3) their assertion that the rezoning deprives them of the highest and best use of the property, and (4) their claims that the property has diminished in value as a result of the rezoning. However, mere diminution in value or interference with a unilateral expectation of proceeding with commercial development is insufficient, as a matter of law, to establish a takings claim entitling the plaintiff to compensation. Likewise, the mere enactment of a zoning ordinance is not an unconstitutional taking. Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation, Wyo., 670 F.2d 900, 904 (10th Cir. 1982).

When the U.S. Supreme Court in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378 (1987) recognized a claim for a compensable regulatory taking, it noted that its holding would not apply "in the case of ... changes in zoning ordinances, variances and the like ...". First English at 482 U.S. 321, 107 S.Ct. 321. In addition to this threshold issue of the applicability of regulatory takings

principles to zoning ordinance actions, a plaintiff must establish that it has been denied all economically viable use of the property.

As a general rule, regulation will be held confiscatory only where it deprives an owner of every use to which the property is reasonably adapted or, put another way, regulation is likely to be held confiscatory when it denies an owner all reasonably beneficial and economically viable use of the property.

Ziegler § 6.08[1] at 6-26, 27. See also First English at 107 S.Ct. 2388-89; Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 107 S.Ct. 1232, 1247 (1987).

Interestingly, Smith cites Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) for the proposition that it need not be deprived of all economically feasible use of the property. This is facially inconsistent with the statements of Justice Scalia in Lucas which emphasize the high threshold showing a property owner must overcome to establish a regulatory takings claim based upon exercise of police powers. The following excerpts from Lucas are illustrative:

- "rendered Lucas's parcels 'valueless.'" p. 2889.
- "complete extinguishment of his property's value ..." p. 2890.
- "permanent ban on construction insofar as Lucas's lots were concerned" p. 2890.
- "Any reasonable economic use of the lots ... render[ed] them valueless." p. 2890
- "obliteration of the value of petitioner's lots" p. 2890.
- "unconditional and permanent" p. 2891.
- "total deprivation of beneficial use" p. 2894.
- "Without economic value" p. 2894.
- "without economically beneficial or productive options" p. 2894.
- "rendered valueless" p. 2896.
- "total regulatory takings" p. 2899.
- "eliminating the land's only economically productive use" p. 2900.
- "total taking" p. 2901.

All citations to 112 S.Ct. (1992). Clearly Justice Scalia did not contemplate mere diminution in value as being sufficient to support a regulatory takings claim.

The Tenth Circuit Court of Appeals has consistently recognized this fundamental requirement to show deprivation of all reasonable economic uses. Clajon Production Corp. v. Petera, 70 F.3d 1566, 1577 (10th Cir. 1995) ("If a regulation prohibits all 'economically beneficial use, then that regulation categorically effects a taking."); C. F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974) (landowner must show he has been deprived of all reasonable uses of his land). Some courts have even required that the interference with use of the land be "so substantial as to render the property worthless or useless." Kent Island Joint Venture v. Smith, 452 F.Supp. 455, 460 (D. Maryland 1978).

The Utah Supreme Court has required the same showing to demonstrate a federal takings claim.

[F]or there to be a taking under a zoning ordinance, the landowner must show that he has been deprived of all reasonable uses of his land. See C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974). For example, almost all zoning decisions have some economic impact on property values. However, mere diminution in property value is insufficient to meet the burden of demonstrating a taking by regulation. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Hadacheck v. Los Angeles, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

Cornish Town v. Koller, 817 P.2d 305, 312 (Utah 1991).

State law protection from takings is established by Article I, Section 22 of the Constitution of Utah. To recover

under Utah law, a plaintiff must have a protected interest in property which has been taken or damaged for a public use.

Farmers New World Life Ins. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990); Colman v. Utah State Land Bd., 795 P.2d 622, 625 (Utah 1990).

To state a claim for regulatory taking under Utah law, Smith must show facts which indicate that they have been deprived of all economically viable use of the land.

The state has broad authority to regulate or prevent certain uses of land under its police power; it need compensate a landowner only if the regulation deprives him or her of all economically viable use of the land, i.e., when it effects a "regulatory taking."

Nat'l Parks and Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 925 (Utah 1993) (emphasis added). See also, Cornish Town v. Koller, 817 P.2d 305, 312 (Utah 1991) (to recover for even a "temporary" regulatory taking a plaintiff must be denied all uses of the property).

To state a claim for inverse condemnation, plaintiffs must establish that the damages were the direct consequence of a public use and to recover damages they must be able to show that the damages were (1) anticipated prior to the alleged taking event and (2) an unavoidable consequence of the event. Farmers New World at 1245.

Smith has claimed that it was deprived of all economically viable or reasonable use of the property. For support, however, it argues essentially that (1) it has been deprived of its highest and best use of the property, (2) residential construction "makes no economic sense," and (3) residential use

of the property "would obviously be detrimental to the existing community." None of these arguments meets the threshold showing required to assert a takings claim.<sup>7/</sup>

The case law relied on by Smith is not helpful under the facts of this case. For example, they deal with administrative denial of fill permits, Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171 (Fed. Cir. 1994); Bowles v. U.S. 31 Fed.Cl. 37 (1994); denial of a permit to build on wetlands, K & K Construction, Inc., J.F.K. v. Department of Natural Resources, 551 N.W.2d 413 (Mich App. 1996) appeal granted 562 N.W.2d 788; and revocation of a building permit and subsequent zoning change after construction had begun, Kempf v. City of Iowa City, 402 N.W.2d 393 (Iowa 1987).

By contrast, the present case deals with a legislative action affecting vacant, undeveloped land for which no application for development approval or building permit has been made. Smith has cited no authority supporting its claims in the context of a legislative amendment to a zoning ordinance which affects undeveloped land. The reason is obvious--there is none.

In addition, Smith would have this court turn its back on well-established federal and Utah law which requires it to demonstrate that it has been deprived of all economically viable use of the property. There is clearly no basis for doing so.

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<sup>7/</sup> Smith argued before the trial court that the rear portion of the property could not be developed, resulting in a loss of economically viable use, because it would not permit access to that parcel from 700 East across its commercial development. This argument is unpersuasive for at least two reasons. First, as discussed below, there are three possible alternative access points to the property. Second, "A landowner cannot create his own hardship and then require that zoning regulations be changed to meet that hardship." C. F. Lytle at 838.

Smith has made none of the required factual allegations to establish a basis for inverse condemnation or a regulatory taking under Utah law. Nor have they met the threshold requirement to establish a taking under federal law. The law requires that where a properly enacted zoning ordinance affects a property, there is no taking absent a clear showing that there is no longer any reasonable economic use for the property. The trial court was, therefore, correct in its ruling.

This Court rejects the plaintiffs' legal theory that a diminution in value based upon the plaintiff not being able to use the property for the plaintiffs' perceived highest and best use is a basis upon which to conclude that there has been a "taking."

R. 777. The trial court's ruling should, therefore, be affirmed.

**III. THE CITY'S BARRICADING OF 1055 EAST STREET WAS A PROPER EXERCISE OF ITS POLICE POWER AND CAUSED SMITH NO COMPENSABLE INJURY.**

Smith's argument about the barricading issue suffers from several inconsistencies. First, it argues that the dirt roadway extending from 1055 East onto its property is a public roadway by virtue of the provisions of Utah Code Ann. § 27-12-89. Then it ignores the fact that dirt roads from the other three access points in surrounding subdivisions likewise create public roadways and argues that it has no reasonable alternative access to the rear portion of its property.

The second argument is that the barricading is an improper exercise of the City's police power, an argument made without supportive authority. These arguments are not persuasive. Essentially, Smith would have this Court grant the City no deference on the issue, reject its determinations about the

health, welfare and safety of its citizens, and substitute Smith's judgment for that of the City's legislative body.

- A. UTAH CODE ANN. § 27-12-89 IS NOT SELF-EXECUTING AND SMITH HAS NOT ASKED FOR A JUDICIAL DETERMINATION THAT IT BE APPLIED TO ESTABLISH THE EXISTENCE OF A PUBLIC ROADWAY OR PRESENTED THE FACTS NECESSARY FOR SUCH A DETERMINATION.

The application of § 27-12-89 in this case is somewhat atypical. The normal case is one where plaintiffs are attempting to establish the existence of a roadway as public and the affected property owner attempts to avoid this result. Here, for reasons that are not entirely clear, Smith attempts to establish the dirt road extending past the end of 1055 East as a public road.<sup>8/</sup>

In either case, the provisions of § 27-12-89 are not self-executing. The factual determination leading to the legal conclusion must be made by a court.

The law does not lightly allow the transfer of property from private to public use. The public's taking of property in such circumstances as this case presents requires proof of dedication by clear and convincing evidence. *Thomson v. Condas*, 27 Utah 2d 129, 130, 493 P.2d 639, 639 (1972); *Petersen v. Combe*, 20 Utah 2d 376, 377-78, 438 P.2d 545, 548 (1968).

Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099 (Utah 1995). There is no such clear and convincing evidence in the record. While the City acknowledged that 1055 East had been in public use from the time of its dedication for more than ten

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<sup>8/</sup> The City assumes that Smith doesn't fully understand the implications of its argument that § 27-12-89 establishes these roads crisscrossing its property as public rights-of-way. Such a determination would require that any future development of the property would have to accommodate these existing roadways. In other words, if these are public roadways, Smith cannot build over them unless and until they have been abandoned pursuant to state statutes.



years, it did not, as argued by Smith, admit that the road beyond the subdivision had been in use by the public for over ten years.

INTERROGATORY NO. 8. Does Sandy City admit that such street in and upon Plaintiff's property connecting with 1055 East Street has been in existence (first as a dirt road and then hard surfaced) since the construction of the U.S. Post Office on 700 East Street to the east thereof in approximately 1962?

ANSWER: Defendant does not admit the facts as stated in this interrogatory proposed by the Plaintiff. ...

R. 766 (emphasis added).

Perhaps more fundamental is the fact that Smith never sought a declaration that the roadways in question were public roadways nor did the trial court evaluate that issue or render an opinion which would give effect to § 27-12-89. In its Memorandum Decision, the trial court concluded:

The final claim of the plaintiff is that Sandy City has wrongfully barricaded a street designated as 1055-1075 East. The record shows that the street is part of an adjacent subdivision that abuts the plaintiff's undeveloped property. The pavement ends at the plaintiffs' property line, and Sandy City has apparently placed a barricade prohibiting vehicular traffic from leaving the end of the paved street to come upon plaintiffs' undeveloped property. While at some time it may be appropriate to have the barricade removed should the street be extended into what is now the plaintiffs' property, the City's action in barricading the end of the paved street at the property line between the developed subdivision of the plaintiffs' property is appropriate. The plaintiff has other access to its undeveloped property, and there presently exists no legitimate claim against Sandy City for blocking vehicular traffic at the end of the paved section of the roadway.

Memorandum Decision, R. 778-79.

**B. THE CITY'S PLACEMENT OF BARRICADES AT THE END OF 1055 EAST WAS A PROPER EXERCISE OF ITS POLICE POWERS.**

As discussed above, a City's exercise of its police powers is afforded broad discretion. *E.g.*, Hutchinson. The courts simply do not interfere with this discretion or question the wisdom of the legislative body unless the decision is clearly arbitrary, capricious or illegal. Id. at 1126. The court does not substitute its judgment for that of the legislative body as to the wisdom or desirability of the legislative decision.

The end of 1055 East had been originally barricaded at the request of adjoining landowners in approximately 1975. R. 708. It had been removed by a contractor who paved a portion of the Smith property. R. 708. On May 23, 1978, residents living on 1055 East requested that the City Council replace the recently removed barricades to protect them from excessive dust and reckless driving of individuals using 1055 East as access to Smith's undeveloped property. At the May 23 meeting, the Council voted to temporarily barricade the road pending further investigation by the City officials, including police officials. R. 708.

On May 30, 1978, the City Council heard the recommendations of the City Engineer and police department. R. 709-10. An official from the City Engineer's office reported that 1055 East was not necessary access to Smith's property since there were four other access roads. R. 710. The police department reported that they were unable to enforce traffic laws on Smith's private property and recommended a permanent barricade. R. 710. The Council voted unanimously to permanently barricade the end of

1055 East and to seek reimbursement from the contractor for removing the earlier barricades. R. 710.

The record clearly demonstrates that the City's barricade of 1055 East was done at the request of and for the benefit of citizens living along the street. It was a proper exercise of the City's police power to protect the health, safety and welfare of its citizens. There is no evidence that the barricading was arbitrary or capricious. The City acted upon request and after reasonable investigation of the facts.

**C. SMITH WAS NOT DEPRIVED OF REASONABLE ACCESS TO ITS PROPERTY.**

Smith's argument on this issue ignores both the undisputed facts and the governing legal principles while unilaterally concluding that there remains no reasonable access to the property and that it is entitled to some amorphous compensation. The argument that the barricading somehow deprives Smith of a constitutionally protected property interest fails for three reasons: (1) Under Utah law, Smith has no claim to compensation where it still has reasonable access to the property; (2) There was no physical taking of or substantial interference with Smith's property; and (3) There were two public meetings on the barricade issue which satisfied due process requirements.

Where a City's action has allegedly impaired access to an individual's property, the focus of the court's inquiry is on whether the individual still has reasonable access to the property.

(1) Where governmental action, not amounting to a physical taking, effectively deprives a property owner of reasonable access to property, the owner is entitled to compensation. (2) Where

governmental action, not amounting to a physical taking, merely interferes with an owner's access to property, the owner is not entitled to compensation so long as the owner still has reasonable access. (3) Where governmental action, not amounting to a physical taking, substantially impairs a right appurtenant to an owner's property, or otherwise causes peculiar injury, and thereby results in substantial devaluation, the owner is entitled to compensation.

Three D Corp. v. Salt Lake City, 752 P.2d 1321, 1325-26 (Utah App. 1988) (citations and footnotes omitted).

Although the barricade may interfere with access to plaintiff's property from 1055 East, there remain four (4) reasonable, alternative accesses to the property: 286 feet frontage along 700 East, two access streets from the south, and one access street from the southwest.

The trial court correctly determined that the three remaining access roads from surrounding subdivisions and access from 700 East on the front of Smith's property constituted reasonable access. Without indicating what would be reasonable access, Smith claims the trial court's decision was erroneous and that Smith "dispute[s] that the alternative accesses constitute 'reasonable access.'" This is simply argument for argument's sake which ignores the fundamental undisputed facts before the court.

The trial court properly concluded that there continued to be reasonable access to Smith's property. The City's decision to barricade 1055 East was reasonable and within its discretion in the exercise of its police powers. As a result, Smith suffered no compensable injury and the trial court's ruling should be affirmed.

### CONCLUSION

Smith has failed, both before the trial court and on appeal, to overcome the strong legislative presumption of validity and broad deference afforded to the City and establish that its exercise of its zoning powers was in any way improper, constituted a deprivation of any constitutionally protected rights or amounted to a taking of property without compensation. Nor has it shown that the City's exercise of its police power in barricading the end of a dedicated public street exceeded its authority or was improper, arbitrary or capricious.

The trial court's rulings on these issues are adequately supported by the record and are, as a matter of law, correct. This Court should, therefore, affirm the trial court's ruling.

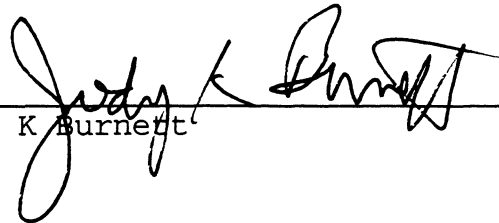
DATED this 10<sup>th</sup> day of September, 1997.

WILLIAMS & HUNT

By Jody K. Burnett  
Jody K. Burnett  
Attorneys for Defendants/  
Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 1997, two (2) true and correct copies of the foregoing **Brief of Appellee Sandy City** was mailed postage prepaid thereon, by first class mail, to Clark W. Sessions, Campbell Maack & Sessions, One Utah Center, 13th Floor, 201 South Main Street, Salt Lake City, Utah 84111-2215.

  
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Jody K. Burnett